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No. 97-2044

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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Respondent offers several erroneous rationales in its effort to avoid review of the holding of the court of appeals that "Customs' regulations interpreting and applying [the Tariff Act] are [not] entitled to deference under *Chevron*" (Pet. App. 3a). First, notwithstanding the clear language of the decision below, respondent asserts that the court of appeals actually made no such holding. Second, implicitly acknowledging that the court of appeals in fact *did* hold that the agency's regulations are entitled to no deference, respondent argues that such a holding draws support from theories that the court of appeals itself has not endorsed. Finally, respondent seeks to sidestep the refusal of the

court of appeals to defer to the regulation by arguing that the regulation is, in any event, invalid on the merits. Nothing in respondent's submission detracts from the obvious importance of the express refusal of the court of appeals to adhere to this Court's decision in *Chevron* and to defer to the regulations issued by the agency that Congress has "charged with responsibility for administering" the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

1. Respondent's principal contention is that the clear holding of the court of appeals that it would not defer to the agency's regulations under *Chevron* (Pet. App. 3a) is "no more than dicta" (Br. in Opp. 21). This characterization of the Federal Circuit's unambiguous rejection of deference for the agency's regulations is refuted by the plain text of the court's decision.[1] The opinion is emphatic in rejecting (Pet. App. 3a)

> the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron* * * * . As we have recently held in several cases, the United States' argument is without merit. See *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

[1] Respondent acknowledges that "the government raised the deference * * * issue" (Br. in Opp. 20) in the courts below. See Pet. App. 23a (noting that the government "argues that Customs is entitled to deference pursuant to *Chevron*").

Respondent errs in asserting that this express rejection of deference to the agency's regulations was unnecessary to the decision of the court of appeals. The court of appeals did not hold in the alternative, as respondent mistakenly implies (Br. in Op. 20-21), that the regulation is invalid on the theory that it conflicts with the plain language of the statute. Indeed, because the court of appeals refused to afford any deference to the agency's regulations, the court did not even consider or address whether the regulation is a *permissible* construction of the vague statutory provision. Instead, stating that the proper construction of the statute is a matter for the courts to resolve "*de novo*" (Pet. App. 4a), the court of appeals simply ignored the regulation in holding that the trial court had properly balanced "the relevant * * * factors" in determining that respondent's permapressing operation is "'incidental to the assembly process' within the meaning of the statute" (*id.* at 3a). The court of appeals only thereafter addressed the contrary determination of the regulation and stated simply that it would not defer to it (*ibid.*).

In so ruling, the court of appeals did not state or hold that the regulation in any manner conflicts with the statute. Instead, the court stated that the regulation is not "entitled to deference under *Chevron*" and is therefore simply not relevant to a proper interpretation of the statute (Pet. App. 3a).

Respondent points out (Br. in Opp. 21) that, in approving the trial court's balancing of "the relevant * * * factors," the court of appeals emphasized that the statutory tariff exception does not prohibit an operation that results in an "advancement in value" so long as "the operation in question is incidental to the assembly process" (Pet. App. 3a). Contrary to respondent's suggestion, however, the court of appeals

did not address or consider whether the agency's regulation violates that statutory principle. See Pet. App. 3a. As we explain in the petition and in further detail below, nothing in the regulation provides (or even suggests) that the statutory tariff exception is inapplicable whenever an operation yields an "advancement in value." Instead, the regulation narrowly provides that certain specified types of chemical treatment of cloth that cause an advancement in value (such as permapressing) are sufficiently unrelated to assembly that they do not qualify as "incidental to assembly" within the scope of the statutory tariff exception. See Pet. 17-21; pages 8-9, *infra*. That regulatory interpretation, which is expressly consistent with the statutory principle on which the court of appeals relied, draws ample support from the findings of the trial court in this case. See Pet. 18-19. Indeed, it was only by substituting its own "balancing" of the "relevant factors" for the balance struck by the agency in adopting the regulation that the trial court reached a different result in this case.

The sole rationale offered by the court of appeals for declining to follow the agency's regulation was the court's broad conclusion that *none* of the regulations of the Customs Service interpreting this statute are entitled to deference (Pet. App. 3a). The opinion of the court of appeals makes clear that this broad holding is the basis for its decision (*ibid.*). In the absence of review by this Court, the decision of the Federal Circuit in this case will thus deprive the entire body of Treasury regulations that interpret the Tariff Acts'

detailed classification provisions of any force in customs adjudication. See Pet. 24-25.[2]

2. a. The only justification given by the court of appeals for its broad refusal to defer to the agency's regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). That implausible rationale is unpersuasive for the reasons described in detail in the petition (Pet. 13-16). Indeed, respondent does not attempt to defend the court's reasoning on its own terms. Instead, respondent incorrectly asserts that the court's stated rationale was not "the sole basis" for its refusal to defer to the regulation (Br. in Opp. 24). A simple reading of the opinion below and of the decisions cited in that opinion, however, confirms that the sole basis for the court's refusal to defer to the regulation was expressly and specifically that "the duty to 'reach the correct decision'" (Pet. App. 4a) is vested in the Court of International Trade under 28 U.S.C. 2643(b). As we explain in the petition (Pet. 14-16), nothing in that statute provides support for the extraordinary conclusion of the court of appeals that, in customs cases, the Court of International Trade need not—and should not—adhere to the decision of this Court in *Chevron*.

Although respondent asserts that the decision of this Court in *Morrill* v. *Jones*, 106 U.S. 466 (1882), is

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[2] Respondent asserts that it is inconsistent for the Customs Service to support application of the *Mast* factors in some circumstances and not support them in the present case (Br. in Opp. 18). That contention ignores the obvious fact that the Customs Service does not support application of the *Mast* factors when, as here, a governing regulation applies instead.

"relevant precedent" (Br. in Opp. 23), respondent fails to offer any explanation of *how* that decision is relevant. In fact, it is not. The *Morrill* decision stands for the unexceptional proposition that "[t]he Secretary of the Treasury cannot by his regulations alter or amend a revenue law." 106 U.S. at 467. That holding is, of course, consistent with the established rule that, when Congress has "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts.[3] *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

b. Respondent urges that a "series of provisions" (Br. in Opp. 24) governing judicial review of Customs Service determinations has some role in determining whether deference is due to the agency's regulations. In addition to 28 U.S.C. 2643(b), on which the court of appeals relied, respondent suggests that 28 U.S.C. 2638, 2639(a)(1) and 2640(a)(1) are also somehow relevant. Respondent fails, however, to identify any particular language in any of these additional statutory provisions

[3] Respondent also errs in relying (Br. in Opp. 23) on *Jarvis Clark Co.* v. *United States*, 733 F.2d 873 (Fed. Cir. 1984). That decision explains that the statutory directive that the Court of International Trade "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" (28 U.S.C. 2643(b)) was enacted to overcome the "dual burden of proof" doctrine that had required importers to show that the government's proposed tariff rate was wrong and also to establish "the proper alternative classification." 733 F.2d at 876. That explanation of Section 2643(b) in *Jarvis Clark Co.* provides no support whatever for respondent's contention that the statute authorizes the courts to decline to give deference to the agency's regulations.

that addresses the degree of deference to be given to Customs Service interpretations of the Tariff Act.

28 U.S.C. 2638 allows a party seeking review of a tariff protest denial to raise "any new ground," so long as certain conditions are present. 28 U.S.C. 2639(a)(1) states that the agency's denial of a protest "is presumed to be correct." 28 U.S.C. 2640(a)(1) directs the Court of International Trade to "make its determinations upon the basis of the record made before the court * * *." None of these provisions has any application to this case, and the courts below did not invoke or in any manner seek to rely upon them. These additional statutory provisions that respondent now urges as an alternative basis for the decision in this case (i) were not even cited by the courts below and (ii) do not provide even a hint of support for the proposition that the agency's regulations "are entitled to [no] deference under *Chevron*" (Pet. App. 3a).[4]

c. The Court of International Trade, like the Tax Court and other specialized tribunals, has a narrow jurisdiction within which it possesses a presumed expertise. It is well established, however, that deference is owed to agency regulations in these specialized federal courts as well as in federal courts of general jurisdiction.[5] See, *e.g.*, Chief Judge Edward D. Re,

[4] In this context, the suggestion of respondent that the government engaged in a "gross distortion" (Br. in Opp. 24) by failing to discuss the irrelevant statutory provisions that respondent now cites—provisions that were neither considered nor addressed by the courts below—is inexplicable.

[5] See, *e.g.*, *Mapco Int'l* v. *FERC*, 993 F.2d 235, 239 (Temp. Emer. Ct. App. 1993); *Square D Co.* v. *Commissioner*, 109 T.C. 200, 225 (1997); *Alumax Inc.* v. *Commissioner*, 109 T.C. 133, 192 (1997); *Wright* v. *Gober*, 10 Vet. App. 343, 351 (Vet. App. 1997); *Davis* v. *Brown*, 10 Vet. App. 209, 213 (Vet. App. 1997).

Litigation Before the United States Court of International Trade, 19 U.S.C.A. 1-1300, at XLI (West Supp. 1998); Pet. 16. It is precisely in cases involving such specialized tribunals that this Court has frequently emphasized that "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). See also Pet. 12.

Respondent simply ignores this established precedent in erroneously contending that the "specialized" (Br. in Op. 22) nature of the Court of International Trade allows it to discard as irrelevant the formal regulations adopted by the Treasury under the Tariff Act.[6] The expertise of the Court of International Trade should be used to apply the Customs Service regulations, not to rewrite or ignore them.

3. a. Respondent engages in a lengthy attack on the reasonableness of the regulation (Br. in Opp. 11-20). That issue, which goes to the ultimate merits of this particular tariff dispute, need not even be addressed by the Court at this time. As we note in the petition, the Court could elect (i) to resolve at this time only the question of the proper degree of deference owed to the agency's regulation and (ii) then remand the case for consideration of the merits of the regulation under that proper standard. Pet. 17 n.6.

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[6] Judicial deference to the authorized regulations issued by the Customs Service enhances, and does not undermine, the legislative goal of providing "uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions" (Br. in Opp. 25, quoting from H.R. Rep. No. 1235, 96th Cong., 2d Sess. 29 (1980)).

Respondent's quarrel with the reasonableness of the particular regulation involved in this case is, in any event, incorrect for the reasons summarized in the petition. See Pet. 17-21. In essence, the regulation is an appropriate interpretation of the statute because a permapressing operation falls within the general guidelines for processes that are "not * * * regarded as incidental" to assembly (19 C.F.R. 10.16(c)). That is because permapressing (like other similar chemical treatments of cloth) is a "significant process * * * which is not related to the assembly process" (*ibid.*). As we explain in the petition (Pet. 17-18), that regulatory determination draws substantial support from the findings in this case. Even if some other viewpoint could also be defended as "reasonable," the conclusion reached in the regulation cannot itself be said to be "unreasonable" and therefore must be sustained. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-844.

4. The Federal Circuit's rejection of deference for the agency's substantive interpretations of the classification provisions of the Tariff Act is a matter of exceptional importance that warrants this Court's review. By denying any deference for the agency's regulations under the Tariff Act, the court of appeals has, for purposes of customs adjudication, essentially nullified the express statutory delegation of rulemaking authority to the agency. By making customs determinations turn in every instance on a judicial "balancing" of "relevant factors," the decision in this case makes the customs process far less predictable, and thus more litigious and costly, both for importers and for the United States. See Pet. 24-25.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1998